PERWIRA AFFIN BANK BHD

v.

WEMBLEY IBAE SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-367-99]
4 DECEMBER 2001

COMPANY LAW: *Suit by company - Commencement - Suit against company after commencement of winding up and appointment of liquidator - Leave of court - Leave to commence action - Proof of debt filed but not acted upon by liquidator - Whether leave to be granted - Companies Act 1965, ss. 226(3), 263(2)*

The plaintiff had filed a claim against the defendant in respect of financial facilities it had granted to the latter. On 27 May 1999 the plaintiff served the statement of claim on the first defendant. On 24 June 1999 the first defendant informed the plaintiff that it had passed a resolution for a winding up and that liquidators had also been appointed to manage its affairs. The plaintiff then filed its proof of debt with the liquidators in an effort to seek an amicable settlement to the claim. The move however came to no avail, as the liquidators had not acted on the same. The plaintiff, in the circumstances, applied for leave under s. 263(2) of the Companies Act 1965 ('the Act'), read with s. 226(3) thereof, for leave to continue with its action against the first defendant. Before the learned judge, the first defendant argued that leave ought not to be granted as the plaintiff's claim, being a claim for liquidated sum, could be proved at the winding up of the first defendant.

Held:

[1] Section 263(2) of the Act contains a requirement that an action or proceeding shall only be proceeded with or commenced against the company, such as the first defendant, with leave of the court after the commencement of the winding up. Section 263(2) must be read with s. 226(3) where leave is required when a winding up order has been made or a provisional liquidator has been appointed. (p 523 g-h)

[2] Section 226(3) of the Act confers upon the court a discretion which, being a judicial discretion must be exercised judicially and according to established judicial principles having regard to the facts and circumstances of each particular case. (p 524 g)

[3] Although the proof of debt has been filed with the liquidators, there was no indication whether it was admitted or rejected by the liquidators. The proof of debt, thus, remained a non-starter. The liquidators cannot rely on their own omission, neglect or refusal to act on the plaintiff's proof of debt as a factor in their favour. The plaintiff, hence, must be entitled to proceed with the suit against the first defendant to its logical end. (p 524 h)

[Leave granted.]

Case(s) referred to:

Mosbert Bhd (In Liquidation) v. Stella D Cruz [1985] 2 MLJ 446 ***(refd)***

Re Cuthbert Lead Smelting Co [1886] WN 84 ***(refd)***

Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners) [1993] 1 CLJ 555 ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 226(3), 263(2)

For the defendant - MS Ong; M/s Chor Pee Anwarul & Co
For the plaintiff - Thilaga Kaliaperumal; M/s Soo Thien Ming & Nashrah

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

This is an application by the plaintiff *vide* encl. (13) for an order that leave pursuant to s. 263(2) of the Companies Act 1965 which, as shall be seen later in this judgment, should be read with s. 226(3) of the same Act be given to the plaintiff to continue with the action herein against defendant 1.

The affidavit in support of this application averred that the writ and statement of claim herein had been served on defendant 1 on 27 May 1999 and appearance was entered by M/s Chor Pee Anwarul & Co (defendant's solicitors) on behalf of defendant 1. By way of letter dated 24 June 1999, defendant 1's solicitors informed the plaintiffs solicitors that a resolution has been passed to wind up defendant 1 and M/s Ong and Wong have been appointed liquidators to manage the affairs of defendant 1. Subsequently, the plaintiff filed with the said liquidators the proof of debt in general form showing the debt of defendant 1 to the plaintiff. A few meetings were then held between the liquidators and the plaintiff's representatives, together with other creditors for the purpose of achieving an amicable settlement but with no measure of success whatsoever. Hence, this application by the plaintiff to this court for the aforesaid leave.

Defendant 1 through the liquidators resisted the plaintiff's application on the ground that the plaintiff has failed to show any reasonable grounds for the leave to be granted to the plaintiff. The liquidators averred and so Cik MS Ong, learned counsel for defendant 1, submitted that the plaintiffs claim is for a liquidated sum founded on financial facilities granted by the plaintiff to defendant 1 which could be proved in the winding up of defendant 1 and that defendant 1 should not be burdened with the costs of defending the said action.

For the plaintiff, it was submitted by Cik Thilaga, learned counsel for the plaintiff, that leave is necessary for the plaintiff to continue the action against defendant 1.

The plaintiff's application in encl. (13) has been served on the Official Assignee, Malaysia on 13 May 2001 and both learned counsel for the plaintiff and defendant 1 informed me that the Official Assignee Malaysia is not involved in the application herein and therefore the attendance of the Official Assignee Malaysia is not necessary.

The matter before me is a simple and straightforward case of applying for leave which in the ordinary turn of events is seldom, if at all, countenanced with any resistance or objection, as an application of this nature is generally uncontested and an order in terms is normally granted in appropriate circumstances. In the light of the objection by defendant 1, it is necessary for me to delve upon the legal implications and effect of s. 263(2) which reads as follows:

> 263. Property and proceedings
>
> (1) ...
>
> (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

Section 263(2) contains a requirement that an action or proceeding shall only be proceeded with or commenced against the company, such as defendant 1 herein, with leave of the court after the commencement of the winding up.

Section 263(2) must be read with s. 226(3), of the same Act where leave of the court is required when a winding up order has been made or a provisional liquidator has been appointed. For purposes of completeness, s. 226(3) is reproduced as follows:

> Actions stayed on winding up order
>
> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

Both ss. 263(2) and 226(3), *supra*, contain equipollent provisions for the purposes of obtaining leave of the court so that an action or proceeding may be proceeded with or commenced against the company in question. In *Mosbert Berhad (In Liquidation) v. Stella D Cruz* [1985] 2 MLJ 446, the then Supreme Court in upholding the leave granted by the High Court, held, *inter alia*, that the court would give the applicant leave if the claim cannot be dealt with adequately in the winding up or if satisfied that the remedy he seeks cannot be given to him in winding up proceedings. Seah, SCJ (as he then was) in delivering judgment of the Supreme Court relied on *Re Cuthbert Lead Smelting Co* [1886] WN 84.

I am mindful of the decision of Selventhiranathan, JC (now J) in *Watta Battery Industries Sdn Bhd v. UniBatt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 CLJ 555, where the petitioner filed a civil suit against the respondent after a petition for the winding up by the respondent. The petitioner also filed proof of debt with the liquidators which was rejected and there was no appeal against that rejection by the liquidator. It was held on these facts that a petitioner cannot have two methods of adjudicating the same claim. As the petitioner could obtain the relief it sought in the civil suit in the winding up proceedings and as it chose to do so by submitting its proof of debt to the liquidators, leave to proceed with the civil suit was refused under s. 226(3).

However, in the case before me, although the petitioner has also filed the proof of debt with the liquidators, there was no indication whatsoever whether it was admitted or rejected by the liquidators. That being the case, the facts are substantially distinguishable from those in *Watta Battery, supra*. The provisions under s. 226(3), *supra*, confer upon the court a discretion which, being a judicial discretion must be exercised judically and according to established judicial principles, having due regard to the facts and circumstances of each particular and individual case. The proof of debt in the instant case remained a non-starter. The liquidators cannot be seen to rely on their own omission, neglect or refusal to act on the plaintiffs proof of debt as a factor in their favour. Hence, I am of the view that the plaintiff is entitled and should be allowed to proceed with the aforesaid civil suit against defendant 1 to its logical conclusion.

In the circumstances, I am of the view that the plaintiff should be given leave under s. 226(3), *supra*, and so I hereby grant leave to the plaintiff in terms of the plaintiff's application in encl. (13).